

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 282B/10
5291281

BETWEEN EASTERN BAY
INDEPENDENT
INDUSTRIAL WORKERS
UNION INC
First Applicant

J MOENGAROA, K OHLSON,
D MOKOMOKO, B POMARE,
G TAIT
Second Applicants

AND CARTER HOLT HARVEY
LIMITED
Respondent

Member of Authority: Dzintra King

Representatives: Kathryn Beck and Karen Jones, Counsel for Applicants
Daniel Erickson, Counsel for Respondent

Memoranda Received: 26 July 2010 from Applicants
11 August 2010 from Respondent

Determination: 24 September 2010

DETERMINATION OF THE AUTHORITY

[1] The sole issue for determination is the amount of lost remuneration owed to the applicants. At the end of the substantive hearing I encouraged the parties to settle the matter of lost remuneration. However, they have been unsuccessful in doing so.

[2] The parties agree that the starting point is to determine the period for which lost remuneration is to be awarded.

[3] The applicants say that if the respondent had undertaken a proper consultation process the parties would have needed to address the Court's decision which was delivered on 9 December 2009. They say this would have taken at least two weeks and that the consultation process would have been unlikely to have been concluded

earlier than 24 December 2009. Notice would then have run from this date, not from 10 December 2009 which is when the respondent claims to have given notice.

[4] Following the consultation process the employer would have needed to consider redeploying the affected staff.

[5] There was evidence that the respondent had introduced a new shift commencing in late January 2010 which the saw doctors should have been afforded the opportunity of applying for. The shift was being trialled for at least three months and if successful would become permanent.

[6] If the applicants had been successful in applying for positions on the new shift they would have received an income for at least three months. They were contractually entitled to wage protection for four months following redeployment according to clause 5.4.1. of the collective agreement. Therefore they would have had an income for at least four months.

[7] The applicants say they are entitled to an award of lost wages from 7 January 2010 (the date they were paid up to) until 7 April 2010.

[8] Each of the second applicants took reasonable steps to obtain alternative employment. However, three of the applicants – Messrs Moengaroa, Ohlson and Mokokoko, did not obtain permanent employment for some weeks.

[9] The applicants were not successful in obtaining employment at the same levels of remuneration.

[10] The income of Messrs Moengaroa, Ohlson and Mokokoko, had they remained at CHH for the period 7 January to 7 April 2010 would have been \$17,135 each. Deducting their actual income (\$5,987.25, \$5,512 and 413,041.81) leaves losses of \$11,148.75, \$11,642 and \$4,093.19 respectively.

[11] Mr Tait obtained alternative employment on 26 January 2010 and the remuneration in the new position is about the same as it was with CHH. His lost income is from 7 January to 26 January 2010. The amount sought is \$2,305.80.

[12] The applicants say they are entitled to three months' loss of wages in the amounts claimed above.

[13] The respondent says the issue is what income have the applicants lost as a result of the procedural deficiencies as opposed to the genuine redundancy situation. How long would it have taken to complete a fair and reasonable process, one that did not include the procedural deficiencies identified by the Authority?

[14] The respondent says that giving proper notice and ensuring the presence of all applicants at the meeting to communicate the decision is likely to have delayed implementation by days, not weeks.

[15] Consultation regarding the substantive matter had been concluded. A proper implementation would not have significantly delayed the effective date of the dismissals.

[16] As to the new shift issue, there was no evidence that there were suitable positions on the new shift. At best, the applicants have been deprived of an opportunity to apply for ongoing work of a different nature.

[17] The respondent says an appropriate award would be in the range of two weeks to a month.

Decision

[18] Awards of lost remuneration in cases of genuine redundancy will be limited to any income lost as a result of the procedural deficiencies. The question is what income has been lost as a result of the procedural deficiencies. The answer has to involve an element of speculation.

[19] While I agree with the respondent that ensuring all the applicants were present at a meeting where the decision to dismiss was to be communicated, and that they had representation, would not have taken a lengthy period - perhaps a few days - the situation is complicated by the circumstances that led to the decision to effect

dismissals. I am referring to the Employment Court's decision which was delivered on 9 December.

[20] Had the respondent taken the time to consider the decision, then called a meeting of all the applicants and ensured they were properly represented, it is likely that notice would not have been given before 24 December 2009.

[21] There would then have been a further period when redeployment issues were dealt with. Given the time of year, I estimate this may have taken four weeks.

[22] The applicants had no guarantee of positions on the new shift.

[23] The procedural deficiencies would, hypothetically, have resulted in a six week period for which lost remuneration can be awarded. The period would be 7 January 2010 to 18 February 2010.

[24] Mr Tait is to be paid \$2,305.80.

[25] The amounts claimed for the other applicants include deductions for actual income. They are, however, for the period 7 January 2010 to 7 April 2010. The respondent is to pay Messrs Mekomoko, Ohlson and Moengaroa six weeks' pay less any income received in that period.

[26] I would not anticipate that there would be any difficulty doing the relevant calculations. However, if the parties are unable to agree, leave is reserved to return to the Authority on this issue.

Dzintra King

Member of the Employment Relations Authority